

VOLUME | OF |

COURT OF CRIMINAL APPEALS NO. CR 04-0476

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIRCUIT COURT NO. CC 02-732-60

CIRCUIT JUDGE Shashy

Type of Conviction / Order Appealed From: RULE 32

Sentence Imposed:

Defendant Indigent: YES NO

WILLIE L. GARDNER AIS# 231984
(Appellant's Attorney) (Telephone No.)
100 WARRIOR LANE
(Address)
BESSEMER, AL. 35023
(City) (State) (Zip Code)

WILLIE L. GARDNER
NAME OF APPELLANT

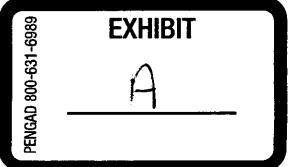
STATE OF ALABAMA

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

NAME OF APPELLEE

(For Court of Criminal Appeals Use Only)



INDEX
CLERK'S RECORD

CASE ACTION SUMMARY.....	1-2
RULE 32 PETITION.....	3-29
ORDER FOR STATE TO RESPOND.....	30
STATE'S ANSWER.....	31-47
DEFENDANT'S REQUEST FOR DISCOVERY.....	48-52
RESPONSE IN PART TO RESPONDENT ANSWER.....	53-55
ORDER DISMISSING PETITION.....	56-58
NOTICE OF APPEAL.....	59-60
REPORTER'S TRANSCRIPT ORDER.....	61
DOCKETING STATEMENT.....	62-63
APPEAL TRANSMITTAL.....	64
CERTIFICATE OF COMPLETION.....	65

ACRO370
OPER: TOR
PAGE: 1ALABAMA JUDICIAL INFORMATION SYSTEM
CASE ACTION SUMMARY
CIRCUIT CRIMINAL

CASE: CC 2002 000732.60

RUN DATE: 09/09/2004

JUDGE: WAS

IN THE CIRCUIT COURT OF MONTGOMERY

STATE OF ALABAMA

VS

GARDNER WILLIE LIZZLIE
AIS# 231984 4-13
100 WARRIOR LANE
BESSEMER, AL 35023 0000

DOB: 05/29/1985

SEX: M

RACE: B

HT: 5 10

WT: 170

HR: BLK

EYES: BRO

CASE: CC 2002 000732.60

SSN: 903000732 ALIAS NAMES:

CHARGE01: RULE 32-FELONY
OFFENSE DATE:CODE01: RULE LIT: RULE 32-FELONY TYP: F #: 001
AGENCY/OFFICER: 0030100

DATE WAR/CAP ISS:

DATE ARRESTED: 09/04/2001

DATE INDICTED:

DATE FILED: 08/26/2004

DATE RELEASED:

DATE HEARING:

BOND AMOUNT:

\$.00

SURETIES:

DATE 1:

DESC:

TIME: 0000

DATE 2:

DESC:

TIME: 0000

TRACKING NOS: CC 2002 000732 00 /

/

DEF/ATY:

TYPE:

TYPE:

00000

00000

PROSECUTOR:

CASE: CC200200073200 CHK/TICKET NO:

GRAND JURY:

COURT REPORTER:

SID NO:

000000000

DEF STATUS: PRISON

DEMAND:

OPER: TOR

TRANS DATE ACTIONS, JUDGEMENTS, AND NOTES

OPE

09/09/2004	ASSIGNED TO: (WAS) WILLIAM A. SHASHY	(AR01)	TOR
09/09/2004	CHARGE 01: RULE 32-FELONY/#CNTS: 001	(AR01)	TOR
09/09/2004	INITIAL STATUS SET TO: "P" - PRISON	(AR01)	TOR
09/09/2004	DEFENDANT ARRESTED ON: 09/04/2001	(AR01)	TOR
09/09/2004	FILED ON: 08/26/2004	(AR01)	TOR
09/09/2004	CASE ACTION SUMMARY PRINTED	(AR08)	TOR
09/09/2004	CAS ATTACHMENT PRINTED	(AR08)	TOR
9/09/04	Copy of Rule 32 Sent to DA & Ag.		
11-15-04	Order Dismissing Rule 32		
10/01/04	Statis Answer		
10/27/04	Request for Production		
11/05/04	Request Response for Part 2 of Respondent Answer		
12/14/04	Notice of Appeal w/ Trans		

DRO369 ALABAMA JUDICIAL INFORMATION CENTER

CASE ACTION SUMMARY
CONTINUATIONCASE: CC 2002 000732.60
JUDGE ID: WAS

STATE OF ALABAMA

VS GARDNER WILLIE LIZZLIE

DATE

ACTION, JUDGMENTS, CASE NOTES

2/14/04 Notice of Appeal w/ Trans.

2/16/04 Appeal Transmittal To Com. App., AG & Def.

CC 02 732-60
 ID YR NUMBER
 (To be completed by Court Clerk)

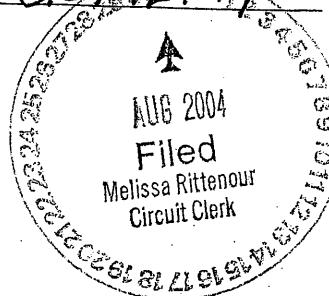
IN FORMA PAUPERIS DECLARATION

CIRCUIT COURT OF MONTGOMERY

[Insert appropriate court]

Willie L. Gardner
 (Petitioner)

vs.
State of Alabama
 (Respondent(s))



DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

Willie L. Gardner, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes _____ No

 - a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

 - b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.
N/A

2. Have you received within the past twelve months any money from any of the following sources?
 - a. Business, profession, or other form of self-employment?
 Yes _____ No
 - b. Rent payments, interest, or dividends?
 Yes _____ No
 - c. Pensions, annuities, or life insurance payments?
 Yes _____ No
 - d. Gifts or inheritances?
 Yes _____ No
 - e. Any other sources?
 Yes _____ No

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

4

3. Do you own cash, or do you have money in a checking or savings account?

Yes _____ No

(Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned.

money received occasionally from family and friend for maintenance and myself

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 8/20/04
(Date)

Willie Gardner
Signature of Petitioner

CERTIFICATE

I hereby certify that the petitioner herein has the sum of \$ 0.83 on account to his credit at the institution where he is confined. I further certify that petitioner likewise has the foregoing securities to his credit according to the records of said William E. Donaldson institution:

*COPY FOR COURT
ATTACHED*

8/9/04
DATE

My Commission Expires

5/3/2008

AUTHORIZED OFFICER OF INSTITUTION

Patricia A. Persons

TS #: 231984

NAME: GARDNER, WILLIE L.

AS OF: 08/09/2004

MONTH	# OF DAYS	AVG DAILY BALANCE	MONTHLY DEPOSITS
AUG	22	\$0.00	\$0.00
SEP	30	\$0.00	\$0.00
OCT	31	\$0.00	\$0.00
NOV	30	\$0.00	\$0.00
DEC	31	\$0.00	\$0.00
JAN	31	\$0.00	\$0.00
FEB	28	\$0.00	\$0.00
MAR	31	\$0.00	\$0.00
APR	30	\$0.15	\$0.00
MAY	31	\$5.74	\$0.18
JUN	30	\$3.05	\$25.00
JUL	31	\$3.45	\$0.00
AUG	9	\$0.83	\$10.00

COURT COPY

6

STATE OF ALABAMA
 DEPARTMENT OF CORRECTIONS
 KILBY CORRECTIONAL FACILITY

S #: 231984

NAME: GARDNER, WILLIE L.

AS OF: 08/09/2004

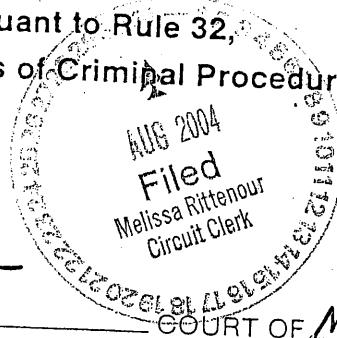
MONTH	# OF DAYS	AVG DAILY BALANCE	MONTHLY DEPOSITS
AUG	22	\$0.00	\$0.00
SEP	30	\$0.00	\$0.00
OCT	31	\$0.00	\$0.00
NOV	30	\$0.46	\$40.00
DEC	31	\$15.32	\$50.00
JAN	31	\$8.67	\$55.00
FEB	28	\$25.04	\$100.00
MAR	31	\$1.90	\$0.00
APR	30	\$0.00	\$0.00
MAY	31	\$0.00	\$0.00
JUN	30	\$0.00	\$0.00
JUL	31	\$0.00	\$0.00
AUG	9	\$0.00	\$0.00

COURT COPY

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

(Pursuant to Rule 32,

Alabama Rules of Criminal Procedure)

Case Number 52

CC

20

732.60

ID

YR

NUMBER REIN THE CIRCUITWillie L. Gardner

Petitioner (Full Name)

COURT OF Montgomery, ALABAMAwas
state of Alabama

vs. Respondent

[Indicate either the "State" or,
if filed in municipal court, the
name of the "Municipality"]Prison Number 231984Place of Confinement William E. Donaldson

County of conviction

Montgomery CountyNOTICE: BEFORE COMPLETING THIS FORM, READ CAREFULLY
THE ACCOMPANYING INSTRUCTIONS.

1. Name and location (city and county) of court which entered the judgment of conviction or sentence under attack 251 S. Lawrence street, circuit court
Montgomery, Ala 36104
2. Date of judgment of conviction 10-23-03
3. Length of sentence Life Without Parole
4. Nature of offense involved (all counts) Capital Murder, Robbery 2,
Attempted Murder
5. What was your plea? (Check one)
 - (a) Guilty
 - (b) Not guilty _____
 - (c) Not guilty by reason of mental disease or defect _____
 - (d) Not guilty and not guilty by reason of mental disease or defect _____

(a) Jury _____

(b) Judge only _____

7. Did you testify at the trial?

Yes _____

No _____

8. Did you appeal from the judgment of conviction?

Yes _____

No _____

9. If you did appeal, answer the following:

(a) As to the state court to which you first appealed, give the following information:

(1) Name of court Court of Criminal Appeals
State of Alabama

(2) Result Dismissed as Untimely Filed

(3) Date of result 9th Jan. 2004

(b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

11. If your answer to Question 10 was "yes", then give the following information in regard to the first such petition, application, or motion you filed: N/A

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

- (4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____

No _____

(5) Result _____

(6) Date of result _____

- (b) As to any second petition, application, or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

- (4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____

No _____

(5) Result _____

(6) Date of result _____

- (c) As to any third petition, application, or motion, give the same information (attach additional sheets giving the same information for any subsequent petitions, applications, or motions):

(1) Name of court _____

(attach additional sheets if necessary)

- (4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____ No _____

- (5) Result _____

- (6) Date of result _____

- (d) Did you appeal to any appellate court the result of the action taken on any petition, application, or motion?

- (1) First petition, etc. Yes _____

No _____

- (2) Second petition, etc. Yes _____

No _____

- (2) Third petition, etc. Yes _____

No _____

**ATTACH ADDITIONAL SHEETS GIVING THE SAME INFORMATION
FOR ANY SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS.**

- (e) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not:

12. Specify every ground on which you claim that you are being held unlawfully, by placing a check mark on the appropriate line(s) below and providing the required information. Include all facts. If necessary, you may attach pages stating additional grounds and the facts supporting them.

GROUNDS OF PETITION

Listed below are the possible grounds for relief under Rule 32. Check the ground(s) that apply in your case, and follow the instruction under the ground(s):

- A. The Constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.

For your information, the following is a list of the most frequently raised claims of constitutional violation:

- (1) Conviction obtained by plea of guilty which was involuntary or induced or made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (2) Conviction obtained by use of coerced confession.
- (3) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (4) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (5) Conviction obtained by a violation of the privilege against self-incrimination.
- (6) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (7) Conviction obtained by a violation of the protection against double jeopardy.
- (8) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (9) Denial of effective assistance of counsel.

This list is not a complete listing of all possible constitutional violations.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each constitutional violation that you claim, whether or not it is one of the nine listed above, and include under it each and every fact you feel supports this claim. Be specific and give details.

B. The court was without jurisdiction to render the judgment or to impose the sentence.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

C. The sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

D. Petitioner is being held in custody after his sentence has expired.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

E. Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to rule 24, or in time to be included in any previous collateral proceeding, and could not have been discovered by any of those times through the exercise of reasonable diligence; and

The facts are not merely cumulative to other facts that were known; and

The facts establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

F. The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

If you checked this ground or relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

13. IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS RULE 32.2(b) LIMITS YOU TO ONLY ONE PETITION IN MOST CIRCUMSTANCES. IT PROVIDES:

"Successive Petitions. The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner. A second or successive petition on different grounds shall be denied unless the petitioner shows both that good cause exist why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

- A. Other than an appeal to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, have you filed in state court any petition attacking this conviction or sentence?

Yes _____ No X

- B. If you checked "Yes," give the following information as to earlier petition attacking this conviction or sentence:

(a) Name of court _____

(b) Result _____

(c) Date of result _____
(attach additional sheets if necessary)

- C. If you checked the "Yes" line in 13A, above, and this petition contains a different ground or grounds of relief from an earlier petition or petitions you filed, attach a separate sheet or sheets labeled: "EXPLANATION FOR NEW GROUND(S) OF RELIEF."

On the separate sheet(s) explain why "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and [why the] failure to entertain [this] petition will result in a miscarriage of justice."

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes _____ No _____

- (a) At preliminary hearing David Eugene Belser, 600 S. Union St
Ste 395, Montgomery, Ala, 36104-4337
- (b) At arraignment and plea David Eugene Belser
- (c) At trial David Eugene Belser
- (d) At sentencing David Eugene Belser
- (e) On appeal Timice Michele Cobb Smith, 300 B
Water St Ste 214, Montgomery, Ala 36104-2558
- (f) In any post-conviction proceeding N/A
- (g) On appeal from adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No _____

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes _____ No _____

18. What date is this petition being mailed?

8/22/04

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

**PETITIONER'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY**

I swear (or affirm) under penalty of perjury that the foregoing is true and correct.

Executed on 8/21/04
(Date)

Melville Goodner

Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this 24 day of

AUGUST 2004

James A Beachem

Notary Public

MY COMMISSION EXPIRES
SEPTEMBER 28, 2004

OR *

**ATTORNEY'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY**

I swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on _____
(Date)

Signature of Petitioner's Attorney

SWORN TO AND SUBSCRIBED before me this _____ day of _____,

Notary Public

Name and address of attorney representing petitioner
in this proceeding (if any)

* If petitioner is represented by counsel, Rule 32.6(a) permits either petitioner or counsel to verify the petition.

IS THE CHARGING INSTRUMENT
"THE INDICTMENT" FATELLY DE-
FECTIVE FOR FAILURE TO ALLEGE
THAT PETITIONER INTENTIONALLY
CAUSED THE DEATH OF ANOTHER
PERSON? YES!

Your petitioner WILLIE LIZZIE GARDNER was charged by the MONTGOMERY COUNTY authorities of the commission of a felony, on the commencement of prosecution the said county for the State of Alabama presented before the Grand Jury an indictment alleging petitioner WILLIE LIZZIE GARDNER violated Penal Codes of Alabama purporting and circumscribing as to the Capital Murder Statute Title 13A, 13A-5-40. (a)(2) Code of Alabama.

Within the indictment it cites the petitioner was in violation of 13A-5-40. (a)(2) of the Alabama Criminal Code, nevertheless it omits an essential element of a component of said statute! The court's have held the mere inclusion of the statutory citation does not cure an otherwise defective indictment that fails to include an essential element of the offense! Ex Parte Harper, 594 So.2d 1181, at 1192 (Ala. 1991).

The Alabama Courts have set out the requirement of a sufficient indictment in Rumlin v. State, 564 So.2d 1386, at 1388, quoting Andrews v. State, 344 So.2d 533 (Ala.Cr.App. 1977):

"An indictment to be sufficient must meet inter alia the following two criteria as set forth in Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240(1962) and in Gayden v. State, 38 Ala.App. 39, 80 So.2d 501 (1954-55)

"(a) The indictment must contain the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet; and

"(b) In case other proceedings are taken against the defendant, the record must show with accuracy to what extent he may plead a former acquittal or conviction."

Andrew v. State, 344 So.2d 533, at 535 (Ala.Cr.App. 1977) made it clear where the indictment didn't contain the essential elements of the offense it can't be waived by failure to timely demur.

This principle of law as to the failure of an indictment to contain an essential element of the charged offense makes resulting convictions invalid is consistent in Alabama Courts:

"When a material element is omitted from an indictment a conviction is due to be vacated and jurisdictional issues are not subject to waiver and may be raised at any time. See Ex Parte Harper, 594 So.2d 1181 (Ala. 1991). Neither are jurisdictional issues subject to a harmless error analysis."

Poole v. State, 846 So.2d 370, at 387 (Ala.Cr.App. 2001).

A valid indictment must contain "the element of the offense intended to be charged..." U.S. v. Bobo, 344 F.3d 1076, at 1083 (11th Cir. 2003).

The Capital Murder Offense is defined at section 13A-5-40. (a)(2) Code of Alabama 1975:

Murder by the defendant during a robbery in the first degree or an
thereof committed by the defendant,

17

The Capital Murder statute in reference makes it a fundamental requisite that a Murder must be committed to constitute the offense, and such must be charged in the indictment as to the offense!

What constitute Murder under Alabama Law?

"13A-6-2. Murder

- (a) A person commits the crime of murder if:
(1) With intent to cause the death of another person he cause the death of that person or of another person; or..."
[pertinent parts]

Title 13A, 13A-6-2.(a)(1) Code of Alabama 1975.

In order for the indictment to be legally sufficient it must allege the element under the statute of "...another person..." in other words the petitioner must have been charged with the intentional killing of another person.

""It is fundamental that an indictment 'must state facts constituting the offense in ordinary concise language,... in such a manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment? Alabama Code 1975 section 15-8-25. Indictments cannot be aided by intendment but must positively and explicitly state what the prisoner is called upon to answer! State v. Seay, 3 Stew 123, 130-31 (Ala. 1830)."

Delevie v. State, 686 So.2d at 1285 (Ala.Cr.App. 1996).

The state could only presumptively contend that the accused was charged sufficiently as to the alleged victim name and the pronoun "he" being averred in the indictment, subsequently such would be only intendments which can't support the charge in the

charging instrument according to Delevie v. State, 686 So.2d at 1285 at 1285 (Ala.Cr.App. 1996).

The name of the alleged victim and "he" and or "him" the pronoun could have indicated any species to include a corporation by definition and usage of words.

The "person" or the term that is expressed in Title 13A, 13A-6-2 "another person," and or "person" makes it a necessity that the indictment explicitly stated the charge against the defendant is due to causing the death of "another person" raising the level of accusation and culpability from that of killing a cow, goat, and or sheep. The indictment must reflect that the defendant killed a human being or words equivalent in nature!

"Person. In general usage, a human being (i.e. natural person), though by statute term may include labor organization, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. See e.g. National Labor Relations Act, section 2(1), 29 U.S.C.A. section 152; Uniform Partnership Act section 2."

BLACKS LAW DICTIONARY.

The State of Alabama was not just left with the legal definition of the word "person" such word has been explicitly defined by statutory construction under Alabama Law:

"Person. A human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality."

Title 13A, 13A-1-2, (6) amended to 13A-1-2.(11) supplement (2003)
Code of Alabama 1975.

"Person. Such term, when referring to the victim of a criminal homicide, means a human being who had been born and was and was alive at the time of the homicidal act."

Title 13A, 13A-6-1.(2). Code of Alabama 1975.

The use of a name in the indictment does not convey the requisite element of "another person" indicating the killing of a human being unjustifiable nor does the term "he" comports to the meaning or definition of person where the word "he" is vague, overbroad, and non-specific and/or all encompassing and excluding.

"He-pron. 1.a. Used to refer to the man or boy previously mentioned or implied. b. Used to refer to a male animal. 2. Usage Problem. Used to refer to a person whose gender is unspecified or unknown: He who desires but acts not, breeds pestilence"(William Blake). -n. A male person or animal: Is the cat a he?"

American Heritage College Dictionary, Third Edition, Copyright 1997, 1993 by Houghton Mifflin Company.

"He. properly a prounoun of the masculine gender but usually used and constructed in a status to include both sexes as well as corporations. May be read "they." Buono v. Yankee Maid Dress Corporation, C.C.A.N.Y. 77 F.2d 274, 278."

BLACKS LAW DICTIONARY.

The term "he" simply does not describes, or charge specific that a "person" or "human being" is in question beyond the male and female sex or both that could be associated with animals.

The words in a statute must be given their ordinary meaning when descrcribing an offense:

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, than there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

Woodard v. State, 846 So.2d 1102, at 1110 (Ala.Cr.App. 2002). quoting Ex Parte State Dept. of Revenue, 683 So.2d 980, 983 (Ala. 1996).

It is clear that in Alabama they have defined "Person" for purposes of law enforcement officials at 13A-1-2.(11) and 13A-6-1.(2) Code of Alabama 1975.

In Alabama there must be a Murder to constitute a Capital Murder conviction and the same elements that are necessary to constitute a Murder conviction are needed for all convictions to which murder is a component. The applicable statute makes the intentionally killing of "another person" an element of the offense and must be charged as such in the indictment!

"An indictment must include essential elements that constitutes the offense and it must not leave any element open to inference. See Heidelberg v. State, 575 So.2d 621, 622 (Ala.Cr.App. 1991);"

"Failure to charge an offense is the kind of defect involved in due process of law and it cannot be waived. Although the law does not compel a 'ritual of words' in an indictment, '[t]he omission of an element of the crime, however, is not a mere formality that may be waived.' 'An indictment that fails to allege each material element of an offense fails to charge that offense.'" Barbee v. State, 417 So.2d 611, 613 (Ala.Cr.App. 1982) (citations omitted)."

Hale v. State, 848 So.2d 224, at 235-36 (Ala.Cr.App. 2002).

Such defect of the indictment is a jurisdictional defect of the indictment which renders the court judgment void. See Ex Parte Lewis, 811 So.2d 485, at 487 (Ala.2001). Ex Parte Lewis, quoting United States v. London, 550 F.2d 206,211 (5th Cir. 1977) "An indictment that fails to allege each material element of an offense fails to charge that offense at 488 Lewis. See also Smith v. State, 777 So.2d 322 (Ala.Cr. App. 2000).

The state has failed to follow a pattern in the charge of MURDER of a known requisite element of the offense which supports the conclusion of the petitioner that the said indictment in this case is defective! ... See Exhibit A. attached.

"2nd: The Grand Jury of said county further charge that, before the finding of this indictment, LARRY JOE JORDAN whose name is to the Grand Jury otherwise unknown, did intentionally cause the death of another person John Howard Odom, by operating a motor vehicle under the influence of alcohol and did thereby cause the death of John Howard Odom by striking the vehicle which John Howard Odom was operating in violation of Section 13A-6-2. of the Alabama Criminal Code."

Ex Parte Jordon, 486 So.2d 485 (Ala. 1986).

The indictment in Ex Parte Jordon, is clear "did intentionally cause the death of another person..."

MOREOVER, there exist abundance of additional support for the conclusion that "another person" is a material element of Murder where such charge necessitate that "another person" being intentionally killed is an element of Murder 13A, 13A-6-2. Code of Alabama 1975.

"That the Grand Jury of said county charge that...on or about the 31st day of July 1993, in the County of Talladega Alabama, Robert Shawn Ingram...did intentionally cause the death of another person, to wit: Gregory Huguley, by burning him, in violation of 13A-6-2 of the Code of Alabama, 1975...."

Ingram v. State, 779 So.2d 1225 (Ala.Cr.App. 1999).

"The Grand Jury of Said County Charge that before the finding of this Indictment Vaughn Gilbert Johnson, Jr., whose name to the Grand Jury is otherwise unknown did intentionally cause the death of another person Rebecca Kay Salter Culbert, by multiple blunt force injuries, in violation of section 13A-6-2 of the Code of Alabama, 1975 as last amended."

Johnson v. State, 584 So.2d 881, at 883 (Ala.Cr.App. 1991).

Dobyne v. State, 672 So.2d 1319, at 1325 (Ala.Cr.App. 1994)

also uses "did intentionally cause the death of another person,"

See also McClain v. State, 659 So.2d 161, at 163 (Ala.Cr.App. 1994):

"The appellant was charged with "intentionally causing the death of another person ...by shooting him with a pistol in violation of section 13A-6-2 of the Code of Alabama."

The petitioner argues persuasively that what the Grand Jury would have did or the facts adduced at trial does not cure a fatally defective indictment!

"We have little doubt that the grand jury in this case still would have returned a true bill against the appellant if the indictment had been constructed properly." Moreover each member of the grand jury most likely considered the very element which is fatally omitted..."

"However we can't speculate. "To allow... a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the

guarantee of the intervention of a grand jury was designed to secure."

United States v. Outler, 659 F.2d 1306, at 1311 (1981).

Judges of Alabama Courts have charged juries as to "another person" being an element of MURDER:

"First of all, murder is the same as a homicide, that is taking the life of another person. unjustifiable,..."

"As I stated capital murder of course is the same as homicide. That is, the taking of the life of another human being."

Ex Parte Brown, 686 So.2d at 422 (Ala. 1996).

Andrews v. State, 344 So.2d 533 (Ala.Cr.App. 1977) citing Mitchell v. State, 27 So.2d 36 (1946) "An indictment must allege sufficient fact to show in and of themselves the criminal offense and a statement of bald conclusion will not suffice, and laxness will not be permitted in charging the commission of a crime."

See also Ex Parte Rumlin, 564 So.2d 1386 (Ala. 1990) cite Andrews at 1388.

A formal accusation sufficient to apprise defendant of nature and cause of accusation is prerequisite to jurisdiction of offense. See Poole v. State, 846 So.2d at 394-395 (Ala.Cr.App. 2002). In essence your petitioner has been adjudged guilty and sentenced under §13A-5-40(a)(2) where the INDICTMENT fails to reflect such charge.

"A court cannot permit a defendant to be tried and convicted on charges not contained in the indictment against him."

Biddle v. State, 316 So.2d 837, 844 (Ala.Cr.App. 1986).

The indictment clause requires that all elements of an offense appear in an indictment. See U.S. v. Stone, 139 F.3d

822, at 831 (11th Cir. 1998). See also Ex Parte Clements, 370 So.2d 723 (Ala. 1979). The Indictment without uncertainty must sufficiently apprise accuse of what he or she must be prepared to defend. See Williams v. State, 710 So.2d at 1320 (Ala.Cr.App. 1996), Breckenridge v. State, 628 So.2d 147 (Ala.Cr.App. 1993), Eillard v. State, 668 So.2d 147 (Ala.Cr.App. 1995), and McHarris v. State, 678 So. 259 (Ala.Cr.App. 1996).

The unjustifiable killing of a human being is a material element of murder as described by statute "another person" 13A-6-2, Code of Alabama 1975. Why? If TRAVIS BENEFIELD had been a cow, goat, or sheep it would not support a conviction of murder in the first degree! In fact it was adduced at trial TRAVIS BENEFIELD was a human being "person" and the charging instrument failed to aver such with specificity made it fatally defective.

"Where an indictment is void and does not charge an offense this court is bound to take notice of such a defect. Barbee v. State, 417 So.2d 611, 613 (Ala.Cr.App. 1982)." Inmon v. State, 585 So.2d 261 (Ala.Cr.App. 1991) at 264.

CONCLUSION

The petitioner's conviction should be vacated by the circuit court as to the insufficiency of the indictment to charge the alleged offense in omitting an essential element of the charge.

COUNT II

DID THE TRIAL COURT VIOLATE
THE DOUBLE JEOPARDY CLAUSE
WHEN THE COURT ENTERED JUDG-
MENT AND CONVICTION IN HIS
CASE WHERE THE TRIAL COURT
ENTERED JUDGMENT ON THE CAPITAL
OFFENSE AND THE ROBBERY OFFENSE
AS TWO SEPARATE VIOLATIONS WHERE
IN EACH COUNT THE SAME FACTUAL
TRANSACTIONS ARE averred IN THE
INDICTMENT.

Your petitioner was convicted in the Montgomery County Circuit Court for the Offense as charged in the INDICTMENT of CAPITAL MURDER as averred in COUNT I there-of and the OFFENSE of ROBBERY as averred in the INDICTMENT as COUNT IV in CC-02-732-SH. See EX.B. attached.

In both charges the INDICTMENT avers:

"...in the course of committing
a theft of a gun and/or lawful
currency and/or coinage of the
United States of America....."

This fact as alleged in the indictments connotes a single transaction eventhough two individuals separately are named in such indictments yet the same incident and or crime.

Your petitioner alleges that when the trial court accepted his guilty plea and imposed sentence the court lacked jurisdiction to do so because the ROBBERY as stated above in regards to the gun, lawful currency, and/or coinage of the United States of America constituted the component of the CAPITAL MURDER CHARGE and could not be used as to the single transaction or event to support an indictment of ROBBERY as charged in COUNT IV.

Your petitioner argues that the State of Alabama has violated the principles of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The same facts without doubt was used in both charges at COUNT I and COUNT IV which formed the same offense charged separately in different counts. Such judgment of the trial court is contrary to Harris v. State, 854 So.2d 145 (Ala.Cr.App. 2002) where the Alabama Criminal Court of Appeals remanded Harris to the trial court to comply with Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912 53 L.Ed.2d 1054 (1977).

This court should vacate the petitioner's ROBBERY conviction in CG-02-732-SR.

COUNT III

WAS TRIAL COUNSEL INEFFECTIVE
FOR FAILURE TO EXPLAIN THE
LESSER INCLUDED OFFENSES OF
CAPITAL MURDER TO PETITIONER
FULLY ABREASTING HIM OF THE
LAW RELEVANT TO THE CHARGE.

In the particular case the attorney failed to advise the defendant that the facts of this case could support the crime of felony murder rather than that of Capital Murder.

What was known to the attorney at the time that the defendant was not the principle party or the trigger to the Capital Offense. It was a arguable fact for a jury to decide if defendant/petitioner was an accomplice or guilty of lesser included offenses of Capital Murder. Counsel presented to the petitioner the ABSOLUTE that he would be convicted and sentenced to death if not accept the plea of guilty; if counsel had ex-

plained that there was any possible chance of the jury bringing back any other verdict besides that of Capital Murder the petitioner would have elected to proceed to trial due to him not being the trigger man and having no intentions to cause the death of anyone. Petitioner acclaims such acts and failure to act on counsel's part denied him effective assistance of counsel in the plead bargaining stage of the proceedings, guaranteed by the Sixth Amendment of the United States Constitution.

ALTERNATIVELY, based on the set of facts in COUNT III your petitioner was denied counsel at a critical stage of the proceedings where the type of perfunctory acts of counsel really in actuality was as if no counsel existed for petitioner.

CONCLUSION

Your petitioner states that the additional COUNT II and COUNT III in this RULE 32 PETITION should cause the court to vacate ROBBERY CONVICTION in the INDICTMENT at COUNT IV thereof as cause for new counsel to be appointed on any further proceedings on

THE STATE OF ALABAMA
MONTGOMERY COUNTY

Circuit Court of Montgomery County, MAY Term, A.D. 2002

COUNT I: The Grand Jury of said County charge that, before the finding of this indictment,

WILLIE LIZZIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Travis Benefield by shooting him with a gun and caused said death during the time that Willie Lizzlie Gardner and/or an accomplice, was in the course of committing a theft of a gun and/or lawful currency and/or coinage of the United States of America, better descriptions of which are unknown to the Grand Jury, of some value, the value of which is unknown to the Grand Jury, the property of Travis Benefield and/or Premium Passage, by the use of force against the person of Travis Benefield, with intent to overcome his physical resistance or physical power of resistance, while the said Willie Lizzlie Gardner and/or an accomplice was armed with a deadly weapon or dangerous instrument, to-wit: a gun, a better description of which is unknown to the Grand Jury, in violation of Section 13A-5-40 of the Code of Alabama 1975 as amended, against the peace and dignity of the State of Alabama.

200

200

Ex-Ar

COUNT IV: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did, in the course of committing a theft of a gun and/or lawful currency and/or coinage of the United States of America, of some value, the value of which is unknown to the Grand Jury, better descriptions of which are unknown to the Grand Jury, use force against the person of the owner or any person present, Raymond Davis, with intent to overcome his physical resistance or physical power of resistance, or threaten the imminent use of force against the person of the owner or any person present, Raymond Davis, with intent to compel acquiescence to the taking of or escaping with the property, while the said Willie Lizzlie Gardner and/or an accomplice was armed with a deadly weapon or dangerous instrument, a gun, a better description of which is unknown to the Grand Jury, in violation of Section 13A-8-41 of the Code of Alabama, against the peace and dignity of the State of Alabama.

ex-B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

v.

CASE NO. CC-2002-732.60

WILLIE L. GARDNER,

Defendant.

ORDER

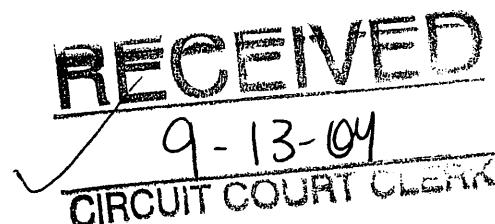
This cause is before the Court upon a Rule 32 Petition filed by Willie L. Gardner, and upon consideration of the same, it is ORDERED that the State of Alabama shall file its response thereto within 30 days.

DONE and ORDERED this the 9th day of September, 2004.



WILLIAM A. SHASHY
CIRCUIT JUDGE

cc: Scott Green, DDA

Willie Gardner
Donaldson Correctional Facility
100 Warrior Lane
Bessemer, AL 35023-7299

RECEIVED
9-13-04
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT
FOR THE FIFTEENTH JUDICIAL CIRCUIT

WILLIE L. GARDNER
Petitioner,

v.

STATE OF ALABAMA
Respondent.

)
)
)
)

Case No. CC-02-0732.60-WAS



**STATE'S ANSWER TO PETITION FOR RELIEF
FROM CONVICTION OR SENTENCE**

COMES NOW the State of Alabama, by and through its District Attorney for the Fifteenth Judicial Circuit, Eleanor I. Brooks, and submits the following answer to the Petitioner's Rule 32 Petition filed on, or about, August 30, 2004.

Procedural Background

1. The Petitioner was indicted by the Montgomery County Grand Jury in May 2002 for the offenses of Capital Murder, two counts of Robbery in the First Degree, two counts of Conspiracy to Commit Murder, and two counts of Conspiracy to Commit Robbery in the First Degree.
2. On October 23, 2003, the Petitioner pled guilty to Capital Murder, Attempted Murder, and one count of Robbery in the First Degree.
3. On October 28, 2003, the Petitioner was found guilty of Capital Murder, following a jury trial, as required in capital murder cases by Ala. Code §13A-5-42.
4. On October 28, 2003, the Petitioner was sentenced to a term of life imprisonment without parole for the Capital Murder, and to terms of life for both the Attempted Murder and the Robbery in the First Degree.
5. The Petitioner filed the present petition on, or about, August 31, 2004.

Alleged Grounds for Relief

As a basis for this Petition, the Petitioner claims the following grounds for relief:

1. The Court was without jurisdiction to render judgment or impose sentence because Count I of the indictment, which charged the Petitioner with Capital Murder, was invalid because it did not specify that the Petitioner was charged with the killing of "another human being."
2. The Petitioner's protection from double jeopardy was violated because the Court entered separate judgments of guilty to both the Capital Murder and the Robbery in the First Degree counts of the indictment.
3. The Petitioner was denied effective assistance of trial counsel.

Burden of Proof

Rule 32.6(b) Ala. R. Crim. P., requires that the petition contain a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." The petition must support every element of the claim with factual allegations. Dean v. State, 570 So. 2d 890 (Ala. Crim. App. 1990). The Petitioner has "the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle him to relief." Rule 32.3 Ala. R. Crim. P.. When a petitioner fails to offer a set of facts upon which relief may be sought, the Court may dismiss the petition. Lockett v. State, 644 So. 2d 34 (Ala. 1994). See also Young v. State, 557 So. 2d 141 (Ala. 1995). See also Davis v. State, 720 So. 2d 1006 (Ala. Crim. App. 1998).

- 1. Petitioner's claim that the indictment was faulty, thus depriving the Court of jurisdiction to render judgment and impose sentence, is without merit and is due to be denied.**

The Petitioner claims that the indictment was faulty because it failed to sufficiently inform him that he was charged with intentionally causing the death of another person.

Specifically, the Petitioner alleges that the indictment is deficient because Count I states that the Petitioner “did intentionally cause the death of Travis Benefield by shooting him with a gun.” (See State’s Exhibit A). The Petitioner alleges that the deficiency arises because the language of Count I does not state that the Petitioner caused the death of another “person.” In support of his claim, the Petitioner cites random court decisions in cases that have incomparable facts. The Petitioner also discusses at length the various potential meanings of the words “he” and “him” as they relate to the victim, Mr. Benefield. Moreover, the Petitioner fails to note in his argument that Count I of the indictment goes on to say that the Petitioner intentionally caused the death of Travis Benefield during the course of committing a theft “by the use of force against the *person* of Travis Benefield.” (See State’s Exhibit A) (emphasis added). Thus, the basis of the Petitioner’s argument is non-existent, and it fails to support his claim with factual allegations.

Therefore, the Petitioner has failed to meet the burden of proof required by Ala. R. Crim. P. 32.3, and his claim is due to be denied.

2. The Petitioner’s claim that the Double Jeopardy clause was violated is without merit because the victim named in the capital murder count of the indictment is a separate individual from the victim listed in the first-degree robbery count to which the Petitioner pled guilty.

The Petitioner’s claim that his protection from double jeopardy was violated is without merit and is due to be denied. The Petitioner claims that double jeopardy was violated because the facts alleged in Counts I and IV of the indictment “connotes [sic] a single transaction” although two separate victims are named in each count. The Petitioner bases his argument on Blockburger v. United States, 284 U.S. 299 (1932), which states that when “the same act constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of an additional fact the other does not.” Blockburger, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338 (1911)).

The counts of the indictment challenged by the Petitioner, Counts I and IV, charged the Petitioner with two separate offenses: the capital murder of Travis Benefield and the first-degree robbery of Ray Davis. (See State's Exhibit A). Each of these charges requires proof of an additional fact that the other does not, namely that 1) Travis Benefield was intentionally murdered during the course of a robbery and 2) Ray Davis was also a victim of first-degree robbery during the Petitioner's continuing course of action.

Because the State of Alabama bore the burden of proving that Travis Benefield was intentionally murdered during the course of a robbery under Count I and that Ray Davis was also a victim of first-degree robbery under Count IV, each of the counts to which the Petitioner pled guilty is a separate offense which required proof of an additional element that the other did not.

Thus, the Petitioner's claim that his protection from double jeopardy was violated is without merit and is due to be denied.

3. The Petitioner's claim that he was denied effective assistance of counsel is without merit and is due to be denied.

The Petitioner's claim that his attorneys, David Belser and Debra Hollis, were ineffective is without merit and is due to be denied. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). When the Court is reviewing a claim of ineffective assistance of counsel, it must indulge a strong presumption that counsel's conduct was appropriate and reasonable. In Strickland, the United States Supreme Court said,

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act, or omission of counsel was unreasonable. A fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct fall within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689 (internal citations omitted). "Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct." Ex parte Baldwin, 456 So. 2d 129, 134 (Ala. 1984), aff'd, 472 U.S. 373 (1985).

Even if deficient performance is proven, a showing of prejudice is also required. Prejudice is proven only when there "exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Burnett v. State, 651 So. 2d 57, 58 (Ala. Crim. App. 1994) (citing Strickland, 466 U.S. at 694). A claimant must show that "but for" counsel's deficient performance the results of the proceedings would have been different. Howard v. State, 551 So. 2d 1155, 1158 (Ala. Crim. App. 1989). To prove prejudice, the alleged errors of counsel must upset the adversarial balance between defense and prosecution so much so that the outcome of the case is rendered unfair. See Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (citing Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)).

In this case, the Petitioner has alleged that his attorneys failed to adequately represent him because they failed to advise the Petitioner that, if the jury believed his version of the facts of the case, it was conceivable that he would be convicted of the lesser-included offense of felony-murder. The Petitioner claims that the advice given to him by his attorneys was that he would be convicted of capital murder and sentenced to death if he chose not accept the State of

Alabama's offer to plead guilty in exchange for a sentence of life without parole. The Petitioner agreed to plead guilty, and he was then found guilty of capital murder by a jury as required by Ala. Code §13A-5-42.

Even if the Petitioner were able to prove that his attorneys were inadequate, he cannot show that he was prejudiced by that inadequacy. After the Petitioner pled guilty to the capital murder of Travis Benefield, he was found guilty of capital murder following the required jury trial. Given the additional finding of guilt by a jury, the Petitioner cannot realistically argue that there is a "reasonable probability" that, but for Mr. Belser and Ms. Hollis' allegedly deficient performance, the result of the Petitioner's case would have been any different. See Burnett, 651 So. 2d at 58. See also Howard, 551 So. 2d at 1158.

The Petitioner cannot show that the alleged errors of his attorneys so upset the adversarial balance between the State and the Petitioner that the result of this case was unfair, thus he cannot meet the burden of proof set forth by Rule 32.3. See Lockhart, 506 U.S. at 369.

Therefore, the Petitioner's claim that he was deprived of effective assistance of counsel is without merit and is due to be denied.

Conclusion

For the foregoing reasons, the Petitioner is not entitled to relief on any of his claims. Therefore, the Respondent, the State of Alabama, moves this Honorable Court to deny Mr. Gardner's Petition for Post-Conviction Relief.

Respectfully submitted on this the 7 day of October 2004.

ELEANOR I. BROOKS
DISTRICT ATTORNEY

Daryl D. Bailey
Daryl D. Bailey
Chief Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon the Petitioner, by placing a copy of the same in the U.S. Mail, first-class postage prepaid and properly addressed to him at AIS# 231984, Donaldson Correctional Facility, 100 Warrior Lane, Bessemer, Alabama 35023.

DONE, this the 7 day of October, 2004.

ELEANOR I. BROOKS
DISTRICT ATTORNEY

Daryl D. Bailey
Daryl D. Bailey
Chief Deputy District Attorney

ADDRESS OF COUNSEL:

Montgomery County District Attorney
100 South Lawrence Street
Montgomery, AL 36104
(334) 832-2550

EXHIBIT

A

THE STATE OF ALABAMA
MONTGOMERY COUNTY

Circuit Court of Montgomery County, MAY Term, A.D. 2002

COUNT I: The Grand Jury of said County charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Travis Benefield by shooting him with a gun and caused said death during the time that Willie Lizzlie Gardner and/or an accomplice, was in the course of committing a theft of a gun and/or lawful currency and/or coinage of the United States of America, better descriptions of which are unknown to the Grand Jury, of some value, the value of which is unknown to the Grand Jury, the property of Travis Benefield and/or Premium Package, by the use of force against the person of Travis Benefield, with intent to overcome his physical resistance or physical power of resistance, while the said Willie Lizzlie Gardner and/or an accomplice was armed with a deadly weapon or dangerous instrument, to-wit: a gun, a better description of which is unknown to the Grand Jury, in violation of Section 13A-5-40 of the Code of Alabama 1975 as amended, against the peace and dignity of the State of Alabama.

COUNT II: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did, in the course of committing a theft of a gun and/or lawful currency and/or coinage of the United States of America, of some value, the value of which is unknown to the Grand Jury, better descriptions of which are unknown to the Grand Jury, use force against the person of the owner or any person present, Travis Benefield, with intent to overcome his physical resistance or physical power of resistance, or threaten the imminent use of force against the person of the owner or any person present, Travis Benefield, with intent to compel acquiescence to the taking of or escaping with the property, while the said Willie Lizzlie Gardner and/or an accomplice was armed with a deadly weapon or dangerous instrument, a gun, a better description of which is unknown to the Grand Jury, in violation of Section 13A-8-41 of the Code of Alabama, against the peace and dignity of the State of Alabama.

COUNT III: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did with the intent to commit the crime of Murder (Section 13A-6-2 of the Code of Alabama), attempt to commit said offense, to-wit: with intent to cause the death of another, he attempted to cause the death of Raymond Davis, by shooting him with a gun, in violation of Section 13A-4-2 of the Code of Alabama, against the peace and dignity of the State of Alabama.

COUNT IV: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, did, in the course of committing a theft of a gun and/or lawful currency and/or coinage of the United States of America, of some value, the value of which is unknown to the Grand Jury, better descriptions of which are unknown to the Grand Jury, use force against the person of the owner or any person present, Raymond Davis, with intent to overcome his physical resistance or physical power of resistance, or threaten the imminent use of force against the person of the owner or any person present, Raymond Davis, with intent to compel acquiescence to the taking of or escaping with the property, while the said Willie Lizzlie Gardner and/or an accomplice was armed with a deadly weapon or dangerous instrument, a gun, a better description of which is unknown to the Grand Jury, in violation of Section 13A-8-41 of the Code of Alabama, against the peace and dignity of the State of Alabama.

COUNT V: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, with the intent that conduct constituting an offense, to-wit: Robbery I, be performed, did agree with one or more person, to-wit: Delano Smith and/or Anthony Fuller and/or Tarus Hall, to engage in or cause the performance of such conduct, and one or more such persons did an overt act to effect an objective of the agreement, to-wit: arm himself with a gun, mask himself, in violation of Section 13A-4-3 of the Code of Alabama, against the peace and dignity of the State of Alabama.

COUNT VI: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZIE GARDNER,

whose name is otherwise unknown to the Grand Jury, with the intent that conduct constituting an offense, to-wit: Robbery I, be performed, did agree with one or more person, to-wit: Delano Smith and/or Anthony Fuller and/or Tarus Hall, to engage in or cause the performance of such conduct, and one or more such persons did an overt act to effect an objective of the agreement, to-wit: arm himself with a gun, mask himself, in violation of Section 13A-4-3 of the Code of Alabama, against the peace and dignity of the State of Alabama.

COUNT VII: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZIE GARDNER,

whose name is otherwise unknown to the Grand Jury, with the intent that conduct constituting an offense, to-wit: Murder, be performed, did agree with one or more person, to-wit: Delano Smith and/or Anthony Fuller and/or Tarus Hall, to engage in or cause the performance of such conduct, and one or more such persons did an overt act to effect an objective of the agreement, to-wit: arm himself with a gun, mask himself, in violation of Section 13A-4-3 of the Code of Alabama, against the peace and dignity of the State of Alabama.

46

COUNT VIII: The Grand Jury of said County further charge that, before the finding of this indictment,

WILLIE LIZZLIE GARDNER,

whose name is otherwise unknown to the Grand Jury, with the intent that conduct constituting an offense, to-wit: Murder, be performed, did agree with one or more person, to-wit: Delano Smith and/or Anthony Fuller and/or Tarus Hall, to engage in or cause the performance of such conduct, and one or more such persons did an overt act to effect an objective of the agreement, to-wit: arm himself with a gun, mask himself, in violation of Section 13A-4-3 of the Code of Alabama,

against the peace and dignity of the State of Alabama.

Flanore D. Brooks
District Attorney, Fifteenth Judicial Circuit of Alabama

J
① 2 - 732 was

• GJ NO. _____

THE STATE OF ALABAMA

Whitlie Lizzine Gardner
B/M HT: WT: DOB:05/29/85 C/O, DEP.

450 Hall St.

450

SID. NO. _____ ARREST DATE 09/04/01

FOR

Consp to Commit Murder (2 xs)
Capital Murder/ Consp to Commit Robbery (2x)

Attempted Murder/Robbery 1 x2

A TRUE BILL

Melvin Pittman

Foreperson of Grand Jury

\$ *5000.00* No Bond

BAIL IN THIS CASE IS FIXED AT

C. J. Redmond

Judge of Circuit Court of Montgomery County

CC NO. _____

SEP 10 2006

Redmond

Presented in open Court by the Foreperson of
the Montgomery County Grand Jury in the pres-

ence of 17 other members of Ben Bristol
the Grand Jury and filed this 5 day of

June, 2002

K. B. Barnett
WK:MPD
Wk:DFS 01-MM-00619

Raymond Davis
2029 Yancey Ave
Joseph Saloom
WK:DFS 01-MM-00619

Clerk of the Circuit Court of Montgomery County

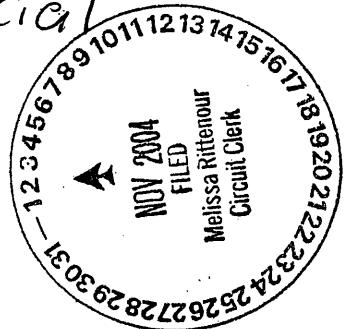
WITNESSES

IN The Circuit Court of Montgomery
County, For The Fifteenth Judicial
Circuit, Alabama

Willie L. Gardner,
Petitioner,

vs.

State of Alabama,
Respondent.



Case No. PC-02-0732.GO-WAS

REQUEST FOR PRODUCTION

Come now the petitioner, Willie L. Gardner, in the above style cause before the court pursuant to applicable rules of court and state as follows:

1. On or about 7 Oct. 2004 the respondent filed their response to the petitioner's Rule 32 Petition.

2. The respondents in their response allege at page 3 that the "person" as element of Robbery is transferred to compensate for the defects in the indictment as to the failure to allege the elements of Murder.

(1)

in the indictment as to the intentional killing of "another person," 49

2. The respondents alleges that petitioner received a jury trial at page 6 of their response.

3. Your petitioner has no benefit of such proceedings taken according to 13A-S-42, Ala Code 1975 to which the State infers and petitioner proffers herein that based on the facts if he was given a jury trial with full panoply of such right to jury trial under 6th Amend US Const. and Ala. Const 1901, Art I, Sec 6; based on the facts a jury could have returned a verdict of felony murder to which does not carries life without parole or death!

4. This is the first instance of petitioner being aware that said plead of guilty was due to

offense of Robbery against "Ty Davis," notwithstanding the respondents contentions there is still a problem in reconciling the Robbery First with the Attempt Murder where the force underlying both offenses is used to support both charges. See page 4 respondent response.

Therefore with premises considered your petitioner request this honorable court to "order" Court reporter and or "Clerk" to provide the petitioner with transcript of the 13A-S-42 proceedings and to provide the petitioner with copy of colloquy of sentencing procedures which reflects the Plead and or the entry thereof of the Plead of guilty to all charge to which petitioner pleaded guilty to in connection with this cause above styled cause!

Petitioner further requests that, either upon a grant or denial, the honorable court provide from such date a 10 day period in which the petitioner may rebut respondent's response to Rule 32 Petition.

Respectfully submitted

Willie Gardner

Willie L. Gardner

AT&T, # 281984

100 Warmer Lane
Bessemer, AL, 35023

(9)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal document has been served on the respondents this 20th Oct. 2004 by placing the same in the U.S. mail postage prepaid and addressed as follows:

Daryl D. Bailey
Chief Deputy District Attorney
100 South Lawrence Street
Montgomery, Ala. 36104

Respectfully submitted,
Willie Gardner
Willie L. Gardner ^{AZSM} 231984
100 Warrior Lane
Bessemer, Ala. 35023

(5)

was
IN THE CIRCUIT COURT OF MONTGOMERY COUNTY,
FOR THE FIFTEENTH JUDICIAL CIRCUIT,
ALABAMA

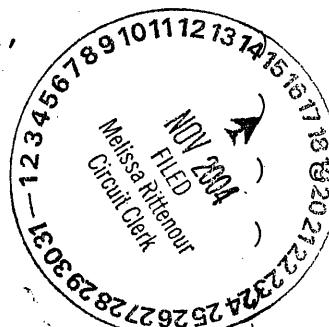
WILLIE L. GARDNER,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.



CASE NO. CC -02-0732.60-WAS

RESPONSE IN PART TO RESPONDENT ANSWER

COMES, now the petitioner in the above style cause before the court pursuant to applicable rules of court:

1. In respondent answer 7th day of Oct. 2004 at page 3 the respondent contend that the mere use and inclusion of the word "person" in the element of robbery as spelled out in the indictment which is defined specifically at 13A-8-41, Ala. Code 1975; that such cures any manifested or implied defects as to the component of the capital offense of Capital Murder which comprises of also the offense of murder as defined at 13A-6-2, Ala. Code 1975 connoting the intent to cause the death of "another person."

2. Ex Parte Jackson, 674 So.2d 1365, at 1369 (Ala. 1994) makes it clear that the Capital Offense of Capital Murder, Murder/Robbery involves the two offenses at 13a-6-2 and 13A-8-41.

3. The respondent has evaded the law involving avertments in an indictment where nothing illustrated in one component releives the state of it's duty to properly charge the complete offense to which petitioner stands convicted and sentenced.

4. The respondent mis-applies the law to petitioner's claim and/or fails to rely on any relevant law for this court to make it's ruling where-as the Criminal Court of Appeals in Harrison v. State, 879 So.2d 594 (Ala.Cr.App. 2003)cites Duncan v. State, 624 So.2d 1084 (Ala.Cr.App. 1993) which reads:

"An indictment that tracks the language of a statute that incorporates a word or phase "defined by law" in another statute need not further clarify the incorporated word or phase."

Harrison, id at 602.

Thus the respondent arguement at page 3 of their answer is meritless where it is clear that the use of "person" in the indictment was "only" to set out the elements of robbery, moreover, 13A-8-23, Ala.Code 1975 differs as to the definition and use of person in regards to that statute as opposed to 13A-6-1, Ala.Code 1975 as it clearly defines that "person" used in connection with the murder statute of 13A-6-2, Ala. Code 1975; furthermore in spelling out the elements of robbery in the indictment it does not make any reference to a factual situation where such law of Harrison, would apply. See for example Title 13A, 13A-8-41 which incorporates 13A-8-43 in such statute where-as 13A-8-43 is a separate offense which in essence has been spelled out in the indictment as a element of first degree robbery. This can't save the respondent from alleging that petitioner intentionally caused the death of a "human being" the meaning of person in connection to murder.

THEREFORE, with premises considered your petitioner herein with supporting law move this honorable court to deny the request of the respondent that such claim is dismissed.

Respectfully submitted,

Willie L. Gardner

WILLIE L. GARDNER

A.I.S.# 231984

100 Warrior Lane

Bessemer, Ala. 35023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal document has been served this 8th day Nov 2004 by placing the same in the United States mail postage prepaid and addressed as follows:

ELLEN Brooks
District Attorney
P.O. Box 1667
Montgomery, Ala. 36102-1667

Respectfully submitted,

Willie L. Gardner

WILLIE L. Gardner

A.I.S.# 231984

100 Warrior Lane

Bessemer, Ala. 35023

**IN THE CIRCUIT COURT
FOR THE FIFTEENTH JUDICIAL CIRCUIT**

WILLIE L. GARDNER
Petitioner,

v.

STATE OF ALABAMA
Respondent.

)
)
)
)
)
)

Case No. CC-02-0732.60-WAS

ORDER

This Court, having reviewed Mr. Gardner's Petition for Post-Conviction Relief filed pursuant to Rule 32, Ala. R. Crim. P., on or about August 31, 2004 and the State's Answer filed on October 8, 2004, hereby finds as follows:

1. The Petitioner's claim that the indictment was faulty, thus depriving this Court of jurisdiction to render judgment and impose sentence, is without merit and is denied. The Petitioner claims that the indictment was faulty because it failed to sufficiently inform him that he was charged with intentionally causing the death of another person. Specifically, the Petitioner alleges that the indictment is deficient because Count I states that the Petitioner "did intentionally cause the death of Travis Benefield by shooting him with a gun." The Petitioner alleges that the deficiency arises because the language of Count I does not state that the Petitioner caused the death of another "person." The Petitioner has failed to prove beyond a preponderance of the evidence the facts necessary to entitle him to relief in accordance with Rule 32.3 of the Ala. R. Crim P.

RECEIVED
11-15-04
CIRCUIT CLERK

2. The Petitioner's claim that the Double Jeopardy clause was violated is without merit and is denied because the victim named in the capital murder count of the indictment is a separate individual from the victim listed in the first-degree robbery count to which the Petitioner pled guilty. Because the State of Alabama bore the burden of proving that Travis Benefield was intentionally murdered during the course of a robbery under Count I and that Ray Davis was also a victim of first-degree robbery under Count IV, each of the counts to which the Petitioner pled guilty is a separate offense which required proof of an additional element that the other did not. Thus, the Petitioner's claim that his protection from double jeopardy was violated is without merit and is denied.
3. The Petitioner's claim that he was denied effective assistance of counsel is without merit and is denied. Petitioner failed to show that but for counsels alleged errors that the outcome of his trial and/or plea would have been different in accordance with Strickland v. Washington, 466 U.S. 668 (1984). Aside from that, this Petitioner plead guilty and this Court took extra lengths to make sure that the Petitioner's plea was entered voluntarily and that all of his rights were protected. Petitioner's counsel are well known and well respected criminal defense attorneys and represented Petitioner in an exceptional manner.
4. These claims and all other claims made by Petitioner are without merit and are denied because Petitioner failed to prove beyond a preponderance of the evidence facts necessary to entitle him to relief and his petition did not contain clear and specific statements of the grounds upon which he sought relief, including a full disclosure of those grounds. Petitioner only made bare allegations that his constitutional rights had been violated and mere conclusions of law. These claims are denied in accordance with Rules 32.3 and 32.6(b) of the Ala. R. Crim. P.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, as Petitioner's instant Petition is precluded by Rules 32.2(a)(3), 32.3, and 32.6(b), Ala. R. Crim. P., and is otherwise without merit, it is summarily dismissed in accordance with Rule 32.7(d), Ala. R. Crim. P. and all costs associated with this proceeding SHALL BE TAXED AGAINST PETITIONER.

Done this the 15 day of Nov, 2004.

William A. Shashy
William A. Shashy
Circuit Court Judge

Cc:

Petitioner ✓

Daryl D. Bailey, Chief Deputy District Attorney ✓

IN THE CIRCUIT COURT OF MONTGOMERY, COUNTY
ALABAMA

WILLIE GARDNER, AIS#231984 B-53)

Petitioner,)

vs.) CASE NUMBER, CC-02-0732, 60-WAS

STATE OF ALABAMA,)

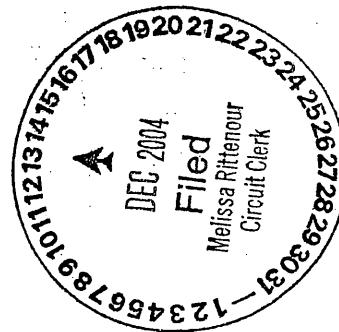
Respondent.)

NOTICE OF APPEAL

I, WILLIE L. GARDNER hereby gives notice of appeal to the Alabama Court of Criminal Appeals from ORDER and Judgment entered by the Hon. William A. Shashy denying Rule 32 Petition on or about 15th day Nov. 2004.

Respectfully submitted,

Willie L. Gardner
WILLIE L. GARDNER, AIS#231984
100 Warrior Lane
Bessemer, Al. 35023



60

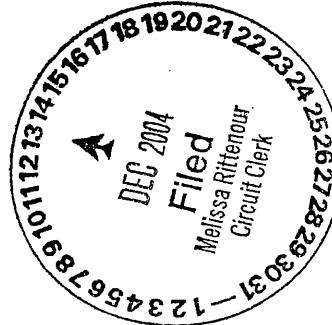
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal documents have been served on the respondents this 14th day Dec. 2004 by placing the same in the United States mail postage prepaid and addressed as follows:

Office of
ELLEN BROOKS
District Attorney
Fifteenth Judicial Circuit of Alabama
P.O. Box 1667
Montgomery, Al. 36102-1667

Respectfully submitted,

Willie L. Gardner
WILLIE L. GARDNER, AIS#231984
100 Warrior Lane
Bessemer, Al. 35023



TO BE COMPLETED BY COUNSEL FOR THE APPELLANT OR BY THE APPELLANT IF NOT REPRESENTED AND FILED WITH THE WRITTEN NOTICE OF APPEAL OR FILED WITHIN 7 DAYS AFTER ORAL NOTICE OF APPEAL IS GIVEN.

CIRCUIT COURT DISTRICT COURT JUVENILE COURT OF MONTGOMERY COUNTY
Willie L. Gardner, Appellant

V. STATE OF ALABAMA MUNICIPALITY OF _____

Case Number <u>CG-02-0732-60-WAS</u>	Date of Judgment/Sentence/Order <u>11/15/04</u>
Date of Notice of Appeal Oral:	Written: <u>12/14/04</u> Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

PART 1. TO BE SIGNED IF THE APPEAL WILL NOT HAVE A COURT REPORTER'S TRANSCRIPT:

I CERTIFY THAT NO REPORTER'S TRANSCRIPT IS EXPECTED AND THAT THE RECORD ON APPEAL SHALL CONSIST OF THE CLERK'S RECORD ONLY. IF THE APPEAL IS FROM DISTRICT COURT OR JUVENILE COURT, I ALSO CERTIFY (1) THAT A STIPULATION OF FACTS WILL BE INCLUDED IN THE CLERK'S RECORD AND THAT THE APPELLANT WAIVES HIS RIGHT TO A JURY TRIAL IF SO ENTITLED; OR (2) THAT THE PARTIES HAVE STIPULATED THAT ONLY QUESTIONS OF LAW ARE INVOLVED AND THAT THE QUESTIONS WILL BE CERTIFIED BY THE JUVENILE/DISTRICT COURT FOR INCLUSION IN THE CLERK'S RECORD (SEE RULE 28(A)(1), ALABAMA RULES OF JUVENILE PROCEDURE, AND §12-12-72, CODE OF ALABAMA 1975).

X
Signature

X
Date

X
Print or Type Name

PART 2. DESIGNATION OF PROCEEDINGS TO BE TRANSCRIBED. Request is hereby made to the court reporter(s) indicated below for a transcript of the following proceedings in the above referenced case (see Rule 10(c)(2), Alabama Rules of Appellate Procedure (A.R.App.P.)):

MARK PROCEEDINGS REQUESTED:

- A. TRIAL PROCEEDINGS - Although this designation will include the judgment and sentence proceedings, a transcript of the organization of the jury and arguments of counsel must be designated separately.
- B. ORGANIZATION OF THE JURY - This designation will include voir dire examination and challenges for cause. Note that in noncapital cases the voir dire of the jury will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCrP.)
- C. ARGUMENTS OF COUNSEL - Note that in noncapital cases the arguments of counsel will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCrP.)

COURT REPORTER(S)

*trans. of proceedings under
13A-S-142 Alabama 1975
Suff'g proceed cap'l murder*

IN ADDITION TO ANY PROCEEDINGS DESIGNATED ABOVE, SPECIAL REQUEST IS HEREBY MADE TO INCLUDE THE FOLLOWING PROCEEDINGS IN THE REPORTER'S TRANSCRIPT PORTION OF THE RECORD ON APPEAL. (ATTACH ADDITIONAL PAGES IF NECESSARY):

ADDITIONAL PROCEEDINGS REQUESTED

DATE

COURT REPORTER(S)

D. ALL PLEADING OF RULE 32 8/22/04

E. _____

11/16/04 17/18/04 21/22/04 24/25/04

F. _____

11/16/04 17/18/04 21/22/04 24/25/04

G. _____

11/16/04 17/18/04 21/22/04 24/25/04

IMPORTANT NOTICE: The court reporter who reported the proceedings for which a transcript is requested must be identified on this form to be effective. Additionally, it is important to note that the appellant may not be permitted to raise any issue on appeal relating to the proceedings in the case that are not specifically designated on this form for inclusion in the reporter's transcript. A general designation such as "all proceedings" is not sufficient. (See Rule 10(c)(2), A.R.App.P.)

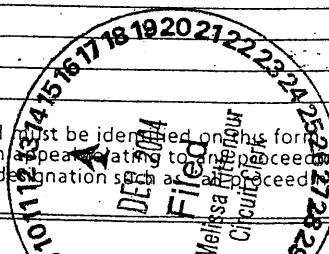
PART 3. MUST BE SIGNED IF THE APPEAL WILL HAVE A COURT REPORTER'S TRANSCRIPT:

I CERTIFY THAT I HAVE DISTRIBUTED THIS FORM AS SET OUT BELOW. I ALSO CERTIFY (1) THAT I HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH EACH COURT REPORTER LISTED ABOVE FOR PREPARING HIS OR HER PORTION OF THE REPORTER'S TRANSCRIPT HEREIN REQUESTED; OR (2) THAT THE APPELLANT PROCEEDED AT TRIAL AS AN INDIGENT AND THAT THAT STATUS HAS NOT BEEN REVOKED; OR, (3) THAT THE APPELLANT HAS BEEN GIVEN PERMISSION TO PROCEED ON APPEAL IN FORMA PAUPERIS.

Willie Gardner
Signature

12/10/04
Date

Willie L. Gardner
Print or Type Name



DISTRIBUTION: Original filed with Clerk of Trial Court and copies mailed to: (1) Clerk of the Court of Criminal Appeals, (2) the District Attorney, (3) the Attorney General or the municipal prosecutor in lieu of the District Attorney and the Attorney General if the appeal is from a municipal conviction, and (4) to each Court Reporter who reported proceedings designated for inclusion in the reporter's transcript.

State of Alabama
Unified Judicial System
Form ARAP- 26 (front) 8/91

COURT OF CRIMINAL APPEALS
DOCKETING STATEMENT

Criminal Appeal Number _____

A. GENERAL INFORMATION:

CIRCUIT COURT DISTRICT COURT JUVENILE COURT OF

MONTGOMERY

COUNTY

WILLIE L. GARDNER

Appellant

V. STATE OF ALABAMA MUNICIPALITY OF _____

Case Number CC-02-0732,60-NAS	Date of Complaint or Indictment	Date of Judgment/Sentence/Order
Number of Days of Trial Hearing Days	Date of Notice of Appeal Oral:	Written: DEC, 14, 2004
Indigent Status Requested: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

B. REPRESENTATION:

Is Attorney Appointed or Retained? Appointed Retained. If no attorney, will appellant represent self? Yes No

Appellant's Attorney (Appellant if pro se) (Attach additional pages if necessary)	Telephone Number		
Address	City	State	Zip Code

C. CODEFENDANTS: List each CODEFENDANT and the codefendant's case number.

Codefendant	Case Number
Codefendant	Case Number
Codefendant	Case Number

D. TYPE OF APPEAL: Please check the applicable block.

- | | | | |
|--|--|--|--|
| 1 <input type="checkbox"/> State Conviction | 4 <input type="checkbox"/> Pretrial Order | 7 <input type="checkbox"/> Juvenile Transfer Order | 10 <input type="checkbox"/> Other, (Specify) _____ |
| 2 <input checked="" type="checkbox"/> Post-Conviction Remedy | 5 <input type="checkbox"/> Contempt Adjudication | 8 <input type="checkbox"/> Juvenile Delinquency | |
| 3 <input type="checkbox"/> Probation Revocation | 6 <input type="checkbox"/> Municipal Conviction | 9 <input type="checkbox"/> Habeas Corpus Petition | |

E. UNDERLYING CONVICTION/CHARGE: Regardless of the type of appeal checked in Section D, please check the box beside each offense category for which the appellant has been convicted or charged as it relates to this appeal. Also include the applicable section of the Code of Alabama for State convictions.

- | | |
|--|---|
| 1 <input checked="" type="checkbox"/> Capital Offense - \$ <u>Capital Murder</u> | 6 <input type="checkbox"/> Trafficking In Drugs - \$ _____ |
| 2 <input type="checkbox"/> Homicide - \$ _____ | 7 <input type="checkbox"/> Theft - \$ _____ |
| 3 <input type="checkbox"/> Assault - \$ _____ | 8 <input type="checkbox"/> Damage or Intrusion to Property - \$ _____ |
| 4 <input type="checkbox"/> Kidnapping/Unlawful Imprisonment - \$ _____ | 9 <input type="checkbox"/> Escape - \$ _____ |
| 5 <input type="checkbox"/> Drug Possession - \$ _____ | 10 <input type="checkbox"/> Weapons/Firearms - \$ _____ |

- | |
|--|
| 11 <input type="checkbox"/> Fraudulent Practices - \$ _____ |
| 12 <input type="checkbox"/> Offense Against Family - \$ _____ |
| 13 <input type="checkbox"/> Traffic - DUI - \$ _____ |
| 14 <input type="checkbox"/> Traffic - Other - \$ _____ |
| 15 <input type="checkbox"/> Miscellaneous (Specify): <u>Murder</u> - \$ <u>2nd degree, 1st</u> |

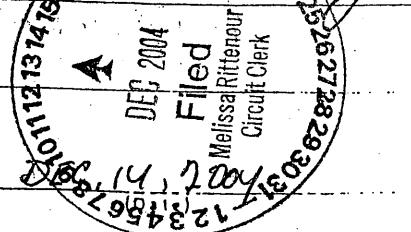
F. DEATH PENALTY:

Does this appeal involve a case where the death penalty has been imposed? Yes No

G. TRANSCRIPT:

- Will the record on appeal have a reporter's transcript? Yes No
- If the answer to question "1" is "Yes," state the date the Reporter's Transcript Order was filed.
- If the answer to question "1" is "No":
 - Will a stipulation of facts be filed with the circuit clerk? Yes No
 - Will the parties stipulate that only questions of law are involved and will the trial court certify the questions? Yes No

NOTE: If the appeal is from the district or juvenile court and the answer to question "1" is "No," then a positive response is required for question 3(a) or 3(b).



DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
8	22	04	Rule 32 PETITION	10	15	2004

I. NATURE OF THE CASE: Without argument, briefly summarize the facts of the case.

Appellant Plead Guilty to Capital Murder, Attempt Murder, and Robbery in Montgomery County Circuit Court.

J. ISSUE(S) ON APPEAL: Briefly state the anticipated issues that will be presented on appeal. (Attach additional pages if necessary)

1. Is the charging instrument "The Indictment" fatally defective for failure to allege that petitioner intentionally caused the death of another person?
2. Did the trial court violate the Double Jeopardy Clause when the court entered judgment and conviction in his case where the trial court entered judgment on the Capital offense and the Robbery offense as to separate violations where in each count the same factual transactions are avowed in the indictment?
3. Was trial counsel ineffective for failure to explain the lesser included offenses of Capital Murder to petitioner fully abreast him of the law relevant to the charge?

K. SIGNATURE:

Malvina
Date

Willie Gardner
Signature of Attorney/ Party Filing this Form

ACR971

ALABAMA JUDICIAL DATA CENTER
 NOTICE OF APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS
 BY THE TRIAL COURT CLERK
 IN THE CIRCUIT COURT OF MONTGOMERY COUNTY
 STATE OF ALABAMA VS GARDNER WILLIE LIZZIE JUDGE: WILLIAM A. SHASHY

APPEAL DATE: 12/14/2004

INDIGENCY STATUS:

GRANTED INDIGENCY STATUS AT TRIAL COURT:	<input checked="" type="checkbox"/>	YES	NO
APP. TRIAL COUNSEL PERMITTED TO W/D ON APPEAL:	<input checked="" type="checkbox"/>	YES	<input checked="" type="checkbox"/> NO
INDIGENT STATUS REVOKED ON APPEAL:	<input checked="" type="checkbox"/>	YES	<input checked="" type="checkbox"/> N/A
INDIGENT STATUS GRANTED ON APPEAL:	<input checked="" type="checkbox"/>	YES	<input checked="" type="checkbox"/> NO

DEATH PENALTY: NO

APPEAL TYPE: RULE 32 PETITION

THIS APPEAL IS FROM AN ORDER DENYING A PETITION (I.E., RULE 32 PETITION, WRIT OF HABEAS CORPUS, ETC) OR FROM ANY OTHER ISSUED BY THE TRIAL JUDGE.

CO/CASE NUMBER: 09/CC 2002 000732.60

ORDER ENTERED (DATE): 11/15/2004 PETITION: DISMISSED DENIED GRANTED

POST-JUDGMENT MOTIONS FILED:	DT FILED	DT DENIED	CON BY AGREE
— MOTION FOR NEW TRIAL			
— MOTION FOR JUDG. OF ACQUITT			
— MOTION TO W/D GUILTY PLEA			
— MOTION FOR ATTY TO W/DRAW			
— OTHER			

COURT REPORTER(S):
ADDRESS:APPELLATE COUNSEL #1:
ADDRESS:

PRO SE

00000

PHONE NUMBER:

000-000-0000

APPELLATE COUNSEL #2:
ADDRESS:

PHONE NUMBER:

APPELLANT (PRO SE):
ADDRESS:GARDNER WILLIE LIZZIE
AIS# 231984 4-13
BESSEMER , AL 350230000

AIS #:

APPELLEE (IF CITY APPEAL):
ADDRESS:I CERTIFY THAT THE INFORMATION PROVIDED
ABOVE IS ACCURATE TO THE BEST OF MY
KNOWLEDGE AND I HAVE SERVED A COPY OF
THIS NOTICE OF APPEAL ON ALL PARTIES TO
THIS ACTION ON THIS 14th DAY OF Dec , 2004OPERATOR: DBH
PREPARED: 12/16/2004Melissa Rittermaw
CIRCUIT COURT CLERK

State of Alabama Unified Judicial System ARAP-14	Rev. 11/91	CERTIFICATE OF COMPLETION AND TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK	Appellate Case Number _____
TO: THE CLERK OF THE COURT OF CRIMINAL APPEALS OF ALABAMA APPELLANT		DATE OF NOTICE OF APPEAL:	12/14/04
v. STATE OF ALABAMA			

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of _____ pages) (_____ volumes of 200 pages each and one volume of _____ pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 4th day of JANUARY, 2005.

Melissa Rittenour
Circuit Clerk